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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

)  
Implementation of Section 34(a)(1) of the )  
Public Utility Holding Company Act of 1935, )  
as added by the Telecommunications Act )  
of 1996 )

GC Docket No. 96-101

**REPLY COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.**

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**AMERICAN COMMUNICATIONS  
SERVICES, INC.**

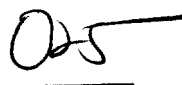
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**REPLY COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.**

American Communications Services, Inc. ("ACSI"), by its attorneys, hereby replies to the comments filed in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.<sup>1</sup>

**Introduction and Summary**

ACSI is in the process of constructing up to 50 local fiber optic networks across the United States in an ambitious effort to compete head-on with the incumbent local exchange telephone companies ("LECs"). As ACSI explained in its initial comments herein, prompt access to Utility poles, conduit, ducts and other rights-of-way on reasonable and nondiscriminatory terms is vital to its ability to compete effectively.

Unfortunately, as the initial submissions by multiple commenters make clear, many Utilities continue to ignore their legal obligation to provide reasonable and nondiscriminatory access to these critical rights-of-way. The problem has been made worse by the fact that

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<sup>1</sup> FCC 96-192, GC Docket No. 96-101 (released April 25, 1996).

some of the principle offenders have formed "exempt telecommunications company" ("ETC") affiliates to begin providing local telecommunications services in competition with the competitive local exchange carriers ("CLECs") to which they are denying access.<sup>2</sup> Some such Utilities effectively are leveraging their monopoly power in the electric market to distort competition in the telecommunications market.

The ETC certification process provides the FCC with a prime opportunity to control this abusive behavior. Utilities should be required to certify and warrant their compliance with the letter and spirit of Section 703(f)<sup>3</sup> of the Telecommunications Act of 1996 (the "1996 Act") as a precondition to certification of their ETC affiliates. This will not impede market entry by law-abiding Utilities/ETCs, but will prevent Utilities from discriminating unfairly against other new entrants. In addition, those entities already granted ETC status should be required to abide by the terms of the strengthened ETC certification process and not procedurally grandfathered. ACSI respectfully submits that the FCC's proposal in this docket should be revamped accordingly.

**I. The FCC Should Require Applicants For ETC Status To Certify That They Will Comply With Their Obligations Under The Communications Act Regarding Nondiscriminatory Access To Rights-of-Way.**

As the opening comments in this proceeding confirm, the entry of ETCs into the local telecommunications services marketplace could accelerate the emergence of local

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<sup>2</sup> Appended hereto as Attachment A is an article from *The Chattanooga Times* enumerating yet another potential ETC entrant.

<sup>3</sup> Codified at 47 U.S.C. § 224(f)(1).

competition significantly.<sup>4</sup> ACSI welcomes ETC market entry, provided that measures necessary to ensure that competition is fair are in place. As the opening comments make clear, the utility affiliates ("Utilities") of ETCs are positioned to compete unfairly with competitive local exchange carriers ("CLECs") by cross-subsidizing competitive communications ventures with monopoly-generated revenue streams, and by denying reasonable access to vital poles, ducts, conduits and other rights-of-way.<sup>5</sup> Two prominent telecom industry analysts recently observed:

"U.S. electric utilities previously have made some bad diversification moves. . . Now they've discovered that they own something very valuable called rights-of-way through which or along which fiber optic cable can be carried."

\* \* \* \* \*

". . . equally critical, are rights-of-way and the construction of fiber optic networks that involve negotiating site locations and building entrance fees and all that stuff. In the U.S., three electric utilities, *Southern Co.*, *Southern California Edison* and *Entergy*, have as much fiber in the ground as the telephone companies in their respective territories. Electric utilities operate regulated businesses that are growing slowly. But they own valuable assets from which they can extract extra growth."<sup>6</sup>

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<sup>4</sup> See, e.g., Comments of BellSouth at 2; Comments of the Association for Local Telecommunications Services ("ALTS") at 1-2.

<sup>5</sup> See Comments of Cincinnati Bell at 3; Comments of BellSouth at 2.

<sup>6</sup> Comments of Ms. Ophelia L. Barsket, senior vice president of Stein Roe & Farnham, and Mr. Jack B. Grubman, managing director of the global telecom staff at Salomon Brothers, respectively, in Barron's "International Forum," April 22, 1996 (emphasis in original).

Utilities clearly have opportunity to use their control of vital rights-of-way to confer a substantial competitive advantage upon their own ETC affiliates. Accordingly, the FCC should utilize the ETC certification process to ensure that Utilities do not in fact undermine the development of local competition by denying CLECs reasonable access to critical rights-of-way.

As ACSI explained in its opening comments, the 1996 Act unequivocally requires every Utility to "provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."<sup>7</sup> As a number of commenters observe, Utilities with ETC affiliates have both the means and incentive to discriminate against CLECs (and in favor of their ETC affiliates) by refusing reasonable access to their poles, ducts, conduit and rights-of-way. ALTS, for example, observed that "public utility holding companies are virtually in the same position as the incumbent local exchange carriers in holding the key to competitors' ability to provide service."<sup>8</sup> Unfortunately, despite the passage of Section 703 of the 1996 Act, some Utilities already have developed a reputation for such deleterious behavior, underscoring the need to use the ETC certification process to ensure compliance.

As stated in its opening comments, in constructing alternative local fiber optic networks, ACSI has found that some Utilities have been willing to allow access to rights-of-way that they control only at unreasonable, grossly excessive and discriminatory prices

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<sup>7</sup> 1996 Act § 703(7) *adding* Section 224(f)(1) to the Communications Act of 1934, as amended, 47 U.S.C. § 224(f)(1).

<sup>8</sup> Comments of ALTS at 3; *see also* Comments of City of New Orleans at 6.

and/or only by placing egregious conditions on such access.<sup>9</sup> Other commenters recite similarly outrageous behavior. For example, ALTS explains how Entergy has obstinately refused to provide access to rights-of-way in the time frame originally agreed upon, while simultaneously establishing an ETC affiliate.

In recent weeks, ACSI has continued to receive second-class treatment from Utilities in pole attachment negotiations. Recent incidents include the following:

- ACSI explained in its Comments that one Utility required that ACSI waive its rights to file a complaint at the FCC for ten years concerning its rates.<sup>10</sup> This Utility now has required that ACSI attorneys sign a statement that such a waiver legally is enforceable. When ACSI asked the Utility to send a draft of the waiver, the Utility stated that the waiver would have to be proposed by ACSI as a means to get access to the Utility's poles without lengthy FCC or court litigation. Although this would supposedly be ACSI's initiative, the Utility made it clear that it would not consider any proposal not accompanied by such a waiver. The Utility appears to be aware of the 1996 Act's Section 703 provisions requiring nondiscriminatory pole attachments, but believes that: a) an FCC complaint would take more time than ACSI can afford to wait; and b) the FCC lacks jurisdiction to set rates, which can only be set by the courts in an eminent domain action. The Utility appears fully aware that by requiring a ten year waiver, it will buy time until

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<sup>9</sup> Comments of ACSI at 6-8.

<sup>10</sup> ACSI Comments at 8-9.

cable rates are raised significantly. Moreover, rates offered for CLEC pole attachments are 400 percent higher than cable rates. The Utility also has suggested that, even if cable rates were offered, there could be significant delays in preparing poles for new fiber at those lower rates. Unless Section 703 and other provisions of the Act are to be rendered meaningless, the Commission must assert control over ETCs where its jurisdiction is without question.

- Some Utilities have refused to provide their methodology for determining pole attachment rates. In some cases, when the methodology is provided, it is completely unreasonable, and merely a means of passing on the Utilities own pole attachment costs to others. For example, one Utility explained that its methodology was that the Utility pays 50 percent of the cost and ACSI pays 50 percent of the cost, despite the fact that the Utility utilizes 99 percent of the pole's capacity. This type of "take it or leave it" pricing typifies the Utility approach of exploiting their unequal bargaining power to its fullest.
- Some Utilities have conveniently passed the responsibility of managing their pole communications space to the incumbent LEC. Of course, this places the responsibility for critical right-of-way in the hands of the very service provider with which ACSI seeks to compete. Utilities attempt to wash their hands of all responsibility for the space once the



incumbent LEC is granted management responsibility. Utilities should not be permitted to shirk this responsibility by passing it on without any ongoing supervision, oversight, or control.

- A continuing problem that ACSI has faced with some Utilities is their delay in negotiating and signing pole attachment and right-of-way agreements. These delays must be seen in the context of the current nationwide race to lay fiber networks and the critical effect of the speed with which a company completes its network in a given market. A three to four month lead over the next competitor, for example, can constitute a significant competitive advantage in signing major customers. The delays by Utilities may be due in part to the fact that these agreements are not a high priority for Utilities. Increasingly, however, it appears to be due to the fact that their telecommunications affiliates are competing directly with ACSI and others attempting to enter their markets. A delay of nine months from initial contact to signing an agreement is not uncommon, even to reach an "interim" agreement. Indeed, one Utility that, not coincidentally is seeking ETC status, has been "studying" ACSI's request for pole attachment space for more than 12 months. Again, the FCC should review the overall approach of Utilities to these negotiations in order to ensure that Utilities do not discourage local competition.

Faced with such Utility foot-dragging on its pole attachment requests, ACSI has been faced with either delaying construction or considering much more difficult and costly network construction alternatives, such as trenching.

The FCC has the responsibility under the 1996 Act to ensure Utility companies' compliance with Section 703. While the Commission can, and certainly should, look to the penalty and forfeiture provisions of the Act to enforce Section 703,<sup>11</sup> the Commission should not rely exclusively on such "after-the-fact" enforcement measures in light of the considerable evidence that the Utility affiliates of ETCs are engaging in egregiously anticompetitive and discriminatory behavior *now*, at the very moment in time that the ETCs and CLECs are seeking to enter the market. Rather, pursuant to the Commission's broad authority to perform all acts and make such rules not inconsistent with the Act, as may be necessary to exercise its functions,<sup>12</sup> the Commission should require, as ACSI and others urge, that applicants for ETC status certify their compliance with Section 703(f)(1) of the 1996 Act.<sup>13</sup> As the New Jersey Division of the Ratepayer Advocate stated, "the initial application is the best place to collect information which various federal and state authorities may eventually require to make fair and timely decisions affecting PUHCs, ETCs and their telecommunications competitors."<sup>14</sup>

In addition, as ALTS and ACSI contend, the FCC should require each ETC to make available upon request all contracts or agreements that the ETC has with any Utility affiliate

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<sup>11</sup> See 47 U.S.C. §§ 501, 502, and 503(b).

<sup>12</sup> See 47 U.S.C. § 4(i).

<sup>13</sup> Comments of ALTS at 5.

<sup>14</sup> Comments of the New Jersey Division of the Ratepayer Advocate at 3.

for use of or access to poles, ducts, conduits or rights-of-way.<sup>15</sup> Only if such contracts are available for public inspection can the FCC easily ensure that ETCs and their Utility affiliates comply with Section 703. Moreover, the Commission should establish a "fresh look" period during which CLECs forced to accept abusive agreements may replace them by selecting right-of-way agreements provided to others. The Commission should make clear that ETC status will be revoked if affiliated Utilities fail to comply with Section 703.

Entergy Corporation and the Southern Company, in contrast with the majority of commenters, argue for the FCC to adopt a "rubber stamp" approach to the ETC certification process. Specifically, they contend that the FCC's role in acting on applications for ETC status are limited to ensuring that the applicant meets the eligibility criteria for ETC status, *i.e.*, engaging exclusively in the business of providing telecommunications or information service, a service or product subject to the FCC's jurisdiction or a product or service related or incidental to the provision of such service or product.<sup>16</sup>

This approach would effectively prevent the FCC from ensuring that the entry of ETCs enhances rather than thwarts local competition. While it might be comforting to applicants to relegate review to a ministerial function, the FCC cannot turn a blind eye to Utility attempts to unfairly leverage their monopoly power in the electric utility market to confer an advantage to their affiliates in the telecommunications market. Sound public policy considerations dictate that the FCC employ the ETC certification process to prevent anticompetitive abuses by incumbent Utilities backing local telecommunications carriers.

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<sup>15</sup> See Comments of ALTS at 4.

<sup>16</sup> 47 U.S.C. § 34(a)(1). Comments of Entergy Corporation at 2, 10; Comments of the Southern Company at 5.

Under Section 4(i) of the Communications Act, the FCC certainly has the statutory discretion to do so in order to implement Congress' directive to ensure CLECs have nondiscriminatory access to vital rights-of-way,<sup>17</sup> and to effectuate Congress's intent to eliminate barriers to entry in the local telecommunications market.<sup>18</sup>

The use of a certification requirement will not constitute a regulatory barrier to entry as some have suggested.<sup>19</sup> Since Utilities and ETCs are required only to make critical rights-of-way available on equal terms, and to attest to their compliance with this requirement, entry will not be delayed for any ETC that is affiliated with a Utility that intends to comply with the unambiguous terms of Section 703 of the 1996 Act.

Finally, this NPRM is limited to implementation of the ETC certification provisions of the Act. But ACSI urges the Commission to be mindful that Utilities are equally capable of favoring business partners which are not themselves ETCs. Utilities, for example, can invest directly in CLECs. Alternatively, the Utility or a subsidiary can enter into a joint venture with a CLEC or incumbent LEC. ACSI urges the Commission to proscribe Utility favoritism towards such non-ETC business partners as well.

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<sup>17</sup> Accord Comments of Cincinnati Bell at 3.

<sup>18</sup> *Cf.*, e.g., 47 U.S.C. §§ 251(b), 251(c), 252(i), and 253.

<sup>19</sup> *See*, e.g., Comments of CINERGY at 1.

## **II. The FCC Should Also Require ETC Applicants To Certify Compliance With The Anti-Subsidy Safeguards In Section 34 Of The Public Utility Holding Company Act.**

Several commenters point out that Utilities are positioned to cross-subsidize the operations of their ETC affiliates.<sup>20</sup> As the New Jersey Division of Ratepayer Advocate notes, "[s]uch subsidization could give public utilities an unfair advantage over other providers of telecommunications services, thereby hampering competitive forces."<sup>21</sup> These parties contend that the FCC should use the ETC application process to help ensure that such discriminatory and anti-competitive conduct does not occur. ACSI agrees. Specifically, the FCC should require that each ETC applicant state whether its Utility affiliate will support its telecommunications operations with revenue generated from the Utility's other businesses,<sup>22</sup> and to adopt reasonable accounting safeguards designed to prevent cross-subsidization. ACSI supports Cincinnati Bell's proposal that the accounting safeguards applicable to incumbent LECs in Parts 32 and 64 of the FCC's Rules be applied to Utilities and their ETC affiliates.<sup>23</sup> The FCC also should require that both the ETC and its Utility affiliate certify that they understand and will abide by the safeguards against cross-subsidization found in Section 34 of the Public Utility Holding Company Act.<sup>24</sup>

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<sup>20</sup> See, e.g., Comments of the United States Telephone Association at 1-2; Comments of Cincinnati Bell at 3; Comments of the New Jersey Division of the Rate Payer Advocate at 3-4.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> See *id.* Failure to live up to the terms of this certification should be grounds for revocation of ETC status.

<sup>23</sup> See Comments of Cincinnati Bell at 3 n. 10.

<sup>24</sup> See Comments of USTA at 2.

### **Conclusion**

For the foregoing reasons and those contained in ACSI's initial comments, ACSI respectfully requests that the FCC revise its proposed rule as enunciated in Attachment B to ACSI's opening comments. The Commission also should require that ETC applicants state whether their Utility affiliates will support the operations of the ETC with revenues generated from other businesses and certify that they will abide by the safeguards against cross-subsidization in relevant FCC rules and in Section 34 of the Public Utility Holding Company Act.

Respectfully submitted,

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July 8, 1996

## CERTIFICATE OF SERVICE

The undersigned verifies that copies of the foregoing Reply Comments of American Communications Services, Inc. were served upon the following, by first-class mail, postage prepare except for Lawrence J. Spiwak and Jerry Cornfeld, both of whom were served by hand delivery.

Dated at Washington, D.C., this 8th day of July, 1996.



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The Chattanooga Times, Tuesday, April 2, 1986

# New player eyes phone scene

## EPB, Ringgold Telephone study fiber optic venture

By Dave Flegner  
The Chattanooga Times

Before the end of the year, businesses and residents in downtown Chattanooga should have a choice of telephone providers.

Chattanooga's electricity supplier is joining with a North Georgia telephone company to form a new telephone company that will break the monopoly on local service enjoyed by Ma Bell for more than a century.

The Electric Power Board is preparing to sign an agreement with the Ringgold Telephone Co. to string fiber optic lines for telephone, data and cable TV transmissions in the Chattanooga area. To start the venture, EPB expects to string at least 10 miles of fiber lines in downtown Chattanooga by this fall.

"This would provide high-speed data links that EPB could use for

its own communications and that others could use for telephone and data communications," said Ron Fugatt, director of engineering at EPB. "This has some exciting possibilities for Chattanooga."

EPB directors will decide next month whether to proceed with a joint venture with Ringgold Telephone Co. For the past year, EPB has been studying the use of its power lines and transmission system for a fiber optics system and selected Ringgold Telephone Co. from among seven companies which submitted proposals.

Fugatt proposed Monday that EPB spend \$150,000 to help set up the joint venture and another \$350,000 to build the downtown fiber optics loop.

"We would expect to get that investment back eventually from the new company and receive a share of any profits from that venture,"

he said.

Ringgold Telephone Co., which serves nearly 11,000 phone customers in Catoosa County, will spend up to \$500,000 to extend its own fiber optic lines more than 12 miles from its offices in Ringgold to the new fiber optic loop in downtown Chattanooga.

"We would anticipate that some of the larger companies in Chattanooga would be interested in a new fiber optic service downtown," said John Salmon, executive vice president for the Ringgold Telephone Co. "We see this as a natural extension of our business. Competition in the telephone business is wide open right now and anybody who wants to get into this business needs to act quickly."

Already, UTC and TVA have expressed interest in a downtown fiber optics link.

Ringgold Telephone Co., which is owned by Alice Evitt Bandy, already owns RTC Communications and WSGC radio. The company was started in 1912 and currently generates about \$8 million a year in sales.

EPB is one of the first of TVA 160 electricity distributors to venture into offering fiber optics telephone service. EPB will not be directly involved in the new phone company, however. The power board and RTC will establish separate company, which would obtain its own financing for the expansion of the phone service.